INDEX

CITATIONS

Cases:

Cases—Continued

Statute: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBERT SCRIVENER, *d/b/a* AA ELECTRIC COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 14-15) is reported at 435 F. 2d 1296. The decision and order of the Board are reported at 177 NLRB No. 65 (App. D, *infra*, pp. 19-73).

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 16-17) was entered on January 6, 1971,

and the Board's timely petition for rehearing *en banc* was denied on February 26, 1971 (App. C, *infra*, p. 18). On May 19, 1971, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including June 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer's discharge of an employee because he has given a written statement to a Board agent during the investigation of an unfair labor practice charge violates Section 8(a)(1) and (4) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act * * *.

STATEMENT

Respondent (the Company) is an electrical contractor engaged in residential and commercial construction in Springfield, Missouri (App. D, pp. 31, 34-35; A. 151-152, 12).[1] On March 18, 1968, a majority of the Company's employees signed cards authorizing Local 453, International Brotherhood of Electrical Workers, AFL-CIO (the Union) to represent them for collective bargaining (App. D, pp. 41-42, 61-62; A. 7-9, 58, 68, 89, 97).[2] The following day, Union representative Moore advised Company President Scrivener of the Union's majority status and asked to negotiate a contract (App. D, pp. 42-43; A. 10). After examining the cards, Scrivener refused (App. D, pp. 43, 61-64; A. 10-11).

Scrivener then visited his several jobsites, complained to the employees of their activities, and at one point threatened to discharge employees who continued to support the Union (App. D, pp. 44-48; A. 69, 9). On March 20, he dismissed card signers Bill Cockrum, Smith, and Wilson when they affirmed their affiliation with the Union (App. D, p. 49; A. 60-61, 25, 72). The next day the Union filed charges with the Board, alleging that the Company had violated Section 8(a)(1), (3), and (5) of the Act (App. D, p. 50). On March 26, Scrivener per-

---

[1] "A." refers to the portion of the record printed as an appendix to the briefs in the court of appeals.

[2] The bargaining unit consisted of six employees. Five of them—Bill and Don Cockrum, Smith, Wilson, and Sanders—signed authorization cards. App. D, pp. 41-42, 61-62.

mitted the three dischargees to return to work, but the following day he again released Bill Cockrum and Smith. While the reason given was lack of work, several junior employees, who had not signed cards, were retained (App. D, p. 51; A. 29, 30, 60, 72-73, 217). Smith was recalled on April 1 and, along with the other card signers except Bill Cockrum, continued to work until April 18 (App. D, pp. 51, 53-54).

On April 17, a field examiner from the Board's Regional office interviewed the five card signers—Bill and Don Cockrum, Smith, Sanders, and Wilson—in connection with the charges filed on March 21. Four of them gave sworn statements to the examiner (App. D, p. 51; A. 30-31, 73-74, 91, 101). The next morning Scrivener questioned several of the men about their interviews with the examiner, and after work that day, dismissed the four card signers still working for him with the explanation that there was no work for them (App. D, pp. 51-54; A. 30-31, 74-75, 92, 110-111).[3]

The Board found that the Company's operations, while too small to satisfy the Board's self-imposed jurisdiction standard,[4] were sufficiently extensive to

---

[3] Three junior employees, who had not signed cards, continued to work. According to credited testimony, the Company had at this time substantial work to complete in at least three houses and a nine-unit apartment dwelling (App. D, pp. 53-54, 59; A. 32-33, 111-112, 213, 214).

[4] The Board's standard requires that an employer have a direct flow of goods in interstate commerce of at least $50,000 a year. *Siemons Mailing Service*, 122 NLRB 81. Though the Company did not meet that standard, it did substantial inter-

"have an impact on and affect interstate commerce" and thus were "within the statutory jurisdiction of the Board" (App. D, p. 20). It concluded that the April 18 discharges of employees Don Cockrum, Smith, Wilson, and Sanders were "in retaliation against them for having met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against the [Company]" (App. D, pp. 20-21); and that this interference with its investigation—"an integral and essential stage of Board proceedings"—violated Sections 8(a)(1) and (4) of the Act (App. D, p. 21). "In these circumstances, public policy requires the Board to assert jurisdiction for the purpose of remedying the [Company's] unlawful interference with the statutory right of all employees freely to resort to and participate in the Board's processes" (App. D, pp. 21-22). Accordingly, the Board ordered the Company to cease and desist from the Section 8(a)(1) and (4) unfair practices, to reinstate the dischargees with back pay, and to post the usual notices (App. D, pp. 23-25).[5]

---

state business. During the previous year (1967), it purchased more than $23,000 of materials from just one of its suppliers, about 90 percent of which originated from outside the State of Missouri; for 1968, its projected purchases of interstate goods from this supplier exceeded $30,000 (App. D, pp. 20, n. 1; 31-33).

[5] The Trial Examiner had found that the Company's conduct also violated Section 8(a)(1), (3), and (5) of the Act, and recommended that the Board remedy these violations, too. However, the Board concluded (with one member dissent-

The Court of Appeals for the Eighth Circuit declined to enforce the Board's order. In a *per curiam* opinion, it held, on the authority of its earlier decision in *National Labor Relations Board* v. *Ritchie Manufacturing Co.*, 354 F. 2d 90, that Section 8(a)(4) does not "encompass discharge of employees for giving written sworn statements to field examiners" (App. A, p. 15). It also refused to find that the discharges independently violated Section 8(a)(1), since "[t]o do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action" (*ibid.*).

REASONS FOR GRANTING THE WRIT

For the second time, the Eighth Circuit has held that an employer may discharge an employee in reprisal for his having given an affidavit in a Board investigation of charges against it. This decision is erroneous, conflicts with decisions of other courts of appeals and, unless corrected, is likely to interfere with the Board's effective administration of the Act.

1. Under Section 8(a)(4), it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the] Act." The Eighth Circuit here, as in its earlier *Ritchie* decision, has narrowly construed this section. It held that the section's protection for an employee who has "given

---

ing) that it would not effectuate the policies of the Act to assert its jurisdiction over these "independent and unrelated" violations and dismissed those portions of the complaint (App. D, pp. 22-23).

testimony" extends only to one who "has actually testified at a hearing," and does not "cover preliminary preparations for giving testimony." *National Labor Relations Board* v. *Ritchie Manufacturing Co.*, *supra*, 354 F. 2d at 101.

This interpretation runs directly counter to the section's manifest objective. By enacting Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 238. Such freedom is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *John Hancock Mutual Life Ins. Co.* v. *National Labor Relations Board*, 191 F. 2d 483, 485 (C.A.D.C.). The Board's investigation of charges is no less essential a part of the administrative process than the filing of charges that initiate the investigation or the formal hearing that follows it. Section 8(a)(4) must be construed to protect any employee who participates in the Board's investigative process from employer retaliation against him for having done so,[6] irrespective of whether the employee filed a

---

[6] The Board's powers under Section 11 of the Act, 29 U.S.C. 161, buttress this construction. That section authorizes the Board to compel persons, including employees, to give statements to Board agents during the investigation of charges. Cf. *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, 768. The persons doing so need not have filed a charge, and may or may not testify at a Board hearing. They nevertheless are entitled to protection under Section 8(a)(4)

charge or actually gave testimony.[7] This has been the Board's long-standing interpretation of Section 8 (a) (4).[8]

---

from employer retaliation for their having been subjected to the Board's Section 11 powers: "Congress intended the protection [under Section 8(a) (4)] to be as broad as the power * * * to subpoena [under Section 11]." *Pedersen* v. *National Labor Relations Board*, 234 F. 2d 417, 420 (C.A. 2).

[7] An employee participating in the Board's investigation often is not called to testify at a formal hearing—because his testimony is cumulative, or because, as happens frequently, the case is settled or dismissed. See *Thirty-fourth Annual Report of the National Labor Relations Board* 212 (G.P.O. 1970). If the employer may punish the employee for giving a statement in the investigation—which is the effect of the court of appeals' decision—employees will be much less willing to cooperate in the Board's investigation, thus significantly impairing the Board's effectiveness in carrying out its duties.

[8] The predecessor of Section 8(a) (4) in the National Industrial Recovery Act (see Executive Order 6711-B (X NRA Codes 895), issued May 15, 1935), provided in pertinent part:

> No employer subject to a code of fair competition approved under [the National Industrial Recovery Act] shall dismiss or demote any employee for making a complaint or *giving evidence with respect to an alleged violation* of the provisions of any code of fair competition approved under said title. [Emphasis supplied.]

The first National Labor Relations Board interpreted the italicized phrase to protect not only the act of testifying at a formal hearing, but also any "giving" of information relative to violations of the NIRA. See *Matter of New York Rapid Transit Corp.*, 1 NLRB 192, 193 (1934); *Matter of Ralph A. Freundlich*, 2 NLRB 147, 148 (1935).

Section 8(a) (4) now reads "testimony", rather than "evidence." But nothing in the legislative history suggests that this change was intended to diminish the broad protection previously accorded, so as to expose employees to reprisals if

The Eighth Circuit's decisions here and in the *Ritchie* case conflict in result with decisions of the Fifth Circuit. In *M & S Steel Company, Inc.* v. *National Labor Relations Board*, 353 F. 2d 80, the Fifth Circuit summarily sustained the Board's finding (148 NLRB 789, 792, 795) that an employer violated Section 8(a)(4) by discharging an employee because he gave an affidavit to a Board agent investigating an unfair labor practice charge. In *National Labor Relations Board* v. *Dal-Tex Optical Co., Inc.*, 310 F. 2d 58, that court enforced a Board determination (131 NLRB 715, 721, 729-730) that discharge of an employee because he appeared but did not testify at a Board hearing, violated Section 8(a)(4). Moreover, the Eighth Circuit's restrictive approach to Section 8(a)(4) is contrary to the expansive interpretation given that section by other courts of appeals in different contexts.[9]

---

their testimony is given through an affidavit in an informal investigation rather than as a witness in a formal hearing. To the contrary, a Senate Labor Committee memorandum described the new language as "merely a reiteration" of the provision found in Executive Order 6711-B, and added that the "need for this provision is attested" by the Board decisions cited above. See Comparison of S. 2926. (73d Congress) and S. 1958 (74th Congress), Senate Committee Print 29, 1 Legislative History of the National Labor Relations Act 1355 (1935).

[9] See, *e.g.*, *National Labor Relations Board* v. *Darling & Company*, 420 F. 2d 63 (C.A. 7); *National Labor Relations Board* v. *Gibbs Corporation*, 308 F. 2d 247 (C.A. 5), enforcing 131 N.L.R.B. 955; *National Labor Relations Board* v. *Eastern Mass. Street Ry. Co.*, 235 F. 2d 700 (C.A. 1), certiorari denied, 352 U.S. 951, enforcing 110 N.L.R.B. 1963;

2. Under Section 8(a)(1), it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 protects the employees' right "to form, join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This guarantee includes the right of employees to give information to the Board and to invoke its processes. If their employer then discharges them for doing so—as in the present case—this restrains them from freely exercising their Sec-

---

Pederson v. *National Labor Relations Board*, 234 F. 2d 417 (C.A. 2); *National Labor Relations Board* v. *Syracuse Stamping Co.*, 208 F. 2d 77 (C.A. 2); *John Hancock Mutual Life Ins. Co.* v. *National Labor Relations Board*, 191 F. 2d 483 (C.A.D.C.). But cf. *Hoover Design Corporation* v. *National Labor Relations Board*, 402 F. 2d 987 (C.A. 6), where the court held that a discharge because the employee threatened to file unfair labor practice charges with the Board did not violate Section 8(a)(4), citing in support the *Ritchie* case.

In the court below as well as before the Board, respondent relied on *Ogle Protective Service*, 149 N.L.R.B. 545. In that case, the trial examiner concluded that the discharge of an employee violated Section 8(a)(3), but declined to find that, because the employee was under subpoena to testify at a Board hearing when discharged, the discharge also violated Section 8(a)(4) "[s]ince the discrimination does not come within the precise language of Section 8(a)(4)." *Id.* at 566. However, no exceptions were filed to the examiner's decision and the Board adopted it *pro forma* (*id.* at 546, n. 2)—that is, without passing on its propriety. Where the Board itself has dealt with the scope of Section 8(a)(4), it has consistently held that it extends to and protects employee participation in the entire investigative process, not just actually filing charges or testifying at a hearing.

tion 7 rights. Thus, wholly apart from Section 8(a)(4), the discharges here violated Section 8(a)(1).

The holding of the court of appeals that the discharges did not violate Section 8(a)(1)—which the court viewed as required to avoid overruling indirectly its decision that no Section 8(a)(4) violation had occurred—conflicts with decisions of the Courts of Appeals for the Fourth, Fifth, and Tenth Circuits. See, *e.g.*, *King Radio Corp.* v. *National Labor Relations Board*, 398 F. 2d 14 (C.A. 10); *National Labor Relations Board* v. *Southland Paint Co.*, 394 F. 2d 717 (C.A. 5); *National Labor Relations Board* v. *Electro-Motive Mfg. Co.*, 389 F. 2d 61 (C.A. 4).[10] Indeed, in sustaining the Board's determination that discharging an employee because he gave a Board agent an affidavit violated Section 8(a)(1), the Fifth Circuit declared that "[t]he giving of an affidavit in the course of a Board proceeding is equivalent to giving testimony." *National Labor Relations Board* v. *Southland Paint Co.*, *supra*, 394 F. 2d at 721.

3. The decision below, if allowed to stand, will significantly impair the Board's administration of the Act. As stated above, employee willingness to

---

[10] The Eighth Circuit's decision on the Section 8(a)(1) question is also at odds with the generally broad scope given that section to protect individuals from reprisal for participation in Board investigations. See, *e.g.*, *Oil City Brass Works* v. *National Labor Relations Board*, 357 F. 2d 466 (C.A. 5); *Texas Industries, Inc.* v. *National Labor Relations Board*, 336 F. 2d 128 (C.A. 5); *Vogue Lingerie, Inc.* v. *National Labor Relations Board*, 280 F. 2d 224 (C.A. 3). Compare *National Labor Relations Board* v. *Marine Workers*, 391 U.S. 418.

participate in the Board's investigative process is essential to the Board's effective performance of its statutory duties. That willingness cannot but be significantly reduced if an employer may freely dismiss an employee for doing so—as the decision here permits.[11]

[11] The fact that the Company's operations did not satisfy the Board's discretionary jurisdictional standards (see n. 4, *supra*, and accompanying text) does not diminish the importance of the case or the need for this Court to correct the Eighth Circuit's holding. The Company's operations are within the Board's statutory jurisdiction. See App. D, p. 20. Where, as here, the employer's actions interfere with the Board's processes and an employee's free access thereto, it is appropriate that the agency exercise its authority to protect its processes without regard to whether it would act with respect to the employer's other violations. See *Pedersen* v. *National Labor Relations Board, supra.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WM. TERRY BRAY,
Assistant to the Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

PAUL J. SPIELBERG,
Attorney,
National Labor Relations Board.

JUNE 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,305

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

v.

ROBERT SCRIVENER, *d/b/a* A A ELECTRIC COMPANY, RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

[January 6, 1971.]

Before MEHAFFY and HEANEY, Circuit Judges, and MEREDITH, District Judge.

PER CURIAM.

The National Labor Relations Board petitions this Court for enforcement of an order against Robert Scrivener, d/b/a A A Electric Company. The Board's decision is reported at 177 N.L.R.B. No. 65, 71 L.R.R.M. 1595 (1969).

The Board found that the Company violated Sections 8(a)(4) and (1) of the National Labor Relations Act by discharging three employees for having met, and having given a written sworn statement to, a Board field examiner investigating unfair labor practice charges filed against Scrivener. The Board dismissed other charges alleging that Scrivener had

violated Sections 8(a)(1), (3) and (5) of the Act, giving as a reason that Scrivener's operation did not meet the Board's discretionary jurisdictional standards.

The principal question raised on this appeal is whether Section 8(a)(4) of the Act, which makes it an unfair labor practice for an employer "to discharge * * * an employee because *he has filed charges or given testimony under this Act*," is to be construed to encompass discharge of employees for giving written sworn statements to Board field examiners. This Court stated in *N.L.R.B.* v. *Ritchie Mfg. Co.*, 354 F. 2d 90 (8th Cir. 1966), that "We are reluctant to hold that § 8(a)(4) can be extended to cover preliminary preparations for giving testimony." This reluctance continues. We are particularly hesitant to overrule or distinguish *Ritchie* in a case where the Board's jurisdiction to act is marginal. Compare, *Hoover Design Corporation* v. *N.L.R.B.*, 402 F. 2d 987 (6th Cir. 1968); *King Radio Corp.* v. *N.L.R.B.*, 398 F. 2d 14 (10th Cir. 1968); *Oil City Brass Works* v. *N.L.R.B.*, 357 F. 2d 466 (5th Cir. 1966).

The National Labor Relations Board suggests that if we are unwilling to overrule or distinguish *Ritchie*, we can accomplish the same result by upholding the Board's finding that the discharges complained of violated Section 8(a)(1) as well as Section 8(a)(4) of the Act. We are unwilling to take this course. To do so would be to overrule *Ritchie* implicitly, and we are not prepared to take that action.

We decline to enforce the order of the Board.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1970

No. 20305

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

vs.

ROBERT SCRIVENER, d/b/a AA ELECTRIC COMPANY, RESPONDENT.

APPLICATION [FOR ENFORCEMENT] OF AN ORDER OF NATIONAL LABOR RELATIONS BOARD.

This cause came on to be heard on the Application for Enforcement of Order of the National Labor Relations Board dated May 20, 1970, (Case No. 17-CA-3519), and on the Answer of Respondent to the Application for Enforcement, and the appendix and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the Application for Enforcement of Order of the National Labor Relations Board in this cause, be, and is hereby, denied,

in accordance with opinion of this Court this day filed herein.

January 6, 1971

Costs taxed in favor of the Respondent:—	
Cost of 25 copies of Brief of Respondent—	$259.20
Total taxable costs of Respondent — for recovery from Petitioner, National Labor Relations Board.	$259.20

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

ROBERT C. TUCKER

by W. F. GRUENINGER
Chief Deputy
May 3, 1971

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1970

No. 20305

NATIONAL LABOR RELATIONS BOARD, PETITIONER.

vs.

ROBERT SCRIVENER, d/b/a A A ELECTRIC CO., RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

The Court having considered petition for rehearing en banc filed by counsel for petitioner and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

February 26, 1971

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 17-CA-3519

ROBERT SCRIVENER, d/b/a A A ELECTRIC CO.

and

LOCAL 453, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

DECISION AND ORDER

On October 30, 1968, Trial Examiner John M. Dyer issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, and the General Counsel and the Charging Party filed briefs in support of the Decision. The Charging Party also filed in response to the Respondent's exceptions to the Trial Examiner's Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the

Trial Examiner insofar as they are consistent herewith.

We find, in agreement with the Trial Examiner, that Respondent's operations have an impact on and affect interstate commerce within the meaning of Section 2(6) and (7) of the Act, and therefore fall within the statutory jurisdiction of the Board.[1] We also find, in partial agreement with the Trial Examiner, that although Respondent's operations do not meet the Board's discretionary jurisdictional standards,[2] it will effectuate the policies of the Act for the Board to assert jurisdiction in the present circumstances, but only to the extent and for the reasons set forth below.

As found by the Trial Examiner and established by the record, the Respondent on April 18, 1968, discharged employees Wilson, Sanders, Smith, and Don Cockrum in retaliation against them for hav-

---

[1] The branch manager of the Graybar Electric Company facility with which Respondent does business in Springfield, Missouri, George A. Griffin, testified that he had examined the records of Graybar at Springfield, and that his examination revealed that Respondent had purchased approximately $4,769.33 worth of goods and materials from Graybar during the period of March 21 until May 9, 1968, and that his estimate was that approximately 90 percent thereof originated outside the State of Missouri. Griffin's testimony as to his examination of records and as to his estimate of interstate purchase is admissible and competent as evidence of impact on commerce within the meaning of Section 2(6) and (7) of the Act. *N.L.R.B.* v. *Jones Lumber Co.*, 245 F. 2d 388 (C.A. 9); *N.L.R.B.* v. *Operating Engineers*, 243 F. 2d 134 (C.A. 9); *Amalgamated Meat Cutters and Butcher Workmen of North America (The Great Atlantic and Pacific Tea Company)* 81 NLRB 1052, at footnote 1.

[2] *Siemons Mailing Service*, 122 NLRB 81.

ing met with and given evidence to a Board field examiner investigating unfair labor practice charges which had been filed against Respondent. We agree that said discharges interfered with the Board's investigation of those charges. The investigation of charges filed is an integral and essential stage of Board proceedings.[3] It is clear that Respondent's conduct falls within the prohibitions of Section 8(a). (1)[4] and (4)[5] of the Act. These sections are designed, at least in part, to safeguard the procedure established for the vindication of Section 7 rights by assuring protection against employer retaliation to those who participate therein. As the Supreme Court has stated, Congress intended that "'. . . all persons with information about unfair labor practices are to be completely free from coercion against reporting them to the Board.'"[6] In these circumstances, public policy requires the Board to assert jurisdiction for the

---

[3] See Section 101.4 of the National Labor Relations Board Statements of Procedure, Series 8, as amended, which provides that as a part of the investigation of unfair labor practice charges a member of the field staff shall interview representatives of the parties and other persons having knowledge as to the charges. Cf. *N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301, at 308 where the Supreme Court stated that "(o)nce its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it."

[4] Cf. *Electro Motive Manufacturing Co.*, 158 NLRB 534; *Southland Paint Co.*, 156 NLRB 22; *Grand-Central Chrysler, Inc.*, 155 NLRB 185; *A & P Import Co.*, 154 NLRB 938.

[5] Cf. *Hoover Design Corporation*, 167 NLRB No. 62, reversed in part 402 F. 2d 987 (C.A. 6); *Manila Manufacturing Company*, 171 NLRB No. 151.

[6] *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235, 238.

purpose of remedying the Respondent's unlawful interference with the statutory right of all employees freely to resort to and participate in the Board's processes.[7]

We find, however, contrary to the Trial Examiner, that it will not effectuate the policies of the Act for the Board to assert jurisdiction herein over the alleged independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act. Although the statute imposes no restrictions on the Board's power to exercise jurisdiction over activities affecting commerce,[8] the Board early adopted the position that it could better effectuate the purposes of the Act if it did not exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress. Consistent with that view, and as the result of experience in the administration of the Act, the Board decided to limit its exercise of jurisdiction to enterprises whose operations had a pronounced impact upon the flow of interstate commerce. The Board's self-imposed jurisdictional standards establish the guidelines by which the Board normally assesses such impact. Adhering to the standards in all but exceptional situations such as that discussed above[9] insures the uniform administration of national labor relations policy and enables the Board

---

[7] *Pedersen* v. *N.L.R.B.*, 234 F. 2d 417 (C.A. 2); *Philadelphia Moving Picture Machine Operators' Union, Local No. 307*, 159 NLRB 1614.

[8] *N.L.R.B.* v. *Denver Bldg. and Constr. Trades Council*, 341 U.S. 675.

[9] Compare, also, the Board policy of asserting jurisdiction over all employers whose operations have a "substantial" impact on national defense. *Ready Mix Concrete & Materials, Inc.*, 122 NLRB 318.

to concentrate its resources on resolving labor disputes having substantial impact on commerce.[10] This case would have been dismissed entirely on jurisdictional grounds had the Respondent not interfered with its employees' right to resort to the Board's processes. The reason is that, unlike remedying the violations of Section 8(a)(4), the remedying of the alleged violations of Section 8(a)(1), (3), and (5) has no immediate impact on the vindication of the right of an individual to resort to the Board's processes and thus provides no independent basis for asserting jurisdiction. In these circumstances, we find that equal and effective administration of the policies of the Act require us to limit our exercise of jurisdiction to remedying the Section 8(a)(4) violations.

Accordingly, we shall dismiss those portions of the complaint alleging independent and unrelated violations of Section 8(a)(1), (3), and (5) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Robert Scrivener, d/b/a A A Electric Co., Springfield, Missouri, his agents, successors, and assigns, shall:

1. Cease and desist from interfering with his employees' right to be interviewed by an agent of the Board and to cooperate with the Board in its investigation of charges by laying off or discharging his employees for exercising such right.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

---

[10] See *Siemons Mailing Service, supra.*

(a) Offer to Don Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders reinstatement in accordance with the recommendations set forth in that section of the Trial Examiner's Decision entitled "The Remedy," insofar as those recommendations relate to the discharge of the above employees occurring on April 18, 1968.

(b) Make Don Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them in accordance with the recommendations set forth in that section of the Trial Examiner's Decision entitled "The Remedy," insofar as those recommendations relate to the discharge of the above employees occurring on April 18, 1968.

(c) Notify Don Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, contracts and contract bids, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at his Springfield, Missouri, shop and office, copies of the attached notice marked "Appendix." [11] Copies of said notice, on forms provided by

[11] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Decision and Order" the words "a Decree of the United States Court of Appeals Enforcing an Order."

the Regional Director for Region 17, after being duly signed by his representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to any unfair labor practices alleged but not herein found.

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman

HOWARD JENKINS, JR., Member

SAM ZAGORIA, Member

National Labor Relations Board

[SEAL]

Member Fanning, concurring in part and dissenting in part:

I agree with the majority's decision in asserting jurisdiction for the purpose of remedying Respondent's unlawful discharge of those employees who utilized the Board's processes. However, I dissent from my colleagues' refusal to extend the protection of the Act to also remedy the violations of 8(a)(1), (3), and (5) of the Act as found by the Trial Examiner. Once the Board asserts jurisdiction, public policy requires the fullest exercise thereof in order to protect employees from any conduct which is unlawful under the Act. See *Philadelphia Moving Picture Machine Operators' Union*, 159 NLRB 1614, footnote 3. I would therefore affirm the Trial Examiner's Decision in full.

JOHN H. FANNING, Member

National Labor Relations Board

Form NLRB-4632
(1-65)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT interfere with your right to be interviewed by or give statements or affidavits to agents of the National Labor Relations Board by laying off or discharging you because you do so.

WE WILL offer Donald Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders their former jobs with all of their rights and any backpay due them.

WE WILL notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military

Training and Service Act, as amended, after discharge from the Armed Forces.

ROBERT SCRIVENER, d/b/a
A A ELECTRIC CO.
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East Twelfth Street, Kansas City, Missouri 64106, Telephone 816—374-5181.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

ROBERT SCRIVENER, d/b/a A A ELECTRIC CO.

and

LOCAL 453, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

James G. Walsh, Jr., Esq., of Kansas City, Mo., Counsel for the General Counsel.

Donald W. Jones, Esq., of *Church, Prewitt, Jones, Wilson* and *Karchmer* of Springfield, Mo., for the Respondent.

Benjamin J. Francka, Esq., Jack Moore and *Ray Edwards* of Springfield, Mo., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

JOHN M. DYER, Trial Examiner: On March 21, 1968,[1] Local 453, International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the Union, the IBEW, or Local 453, filed a charge alleging violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, by Robert Scrivener, d/b/a A A Electric Co., herein called Respondent, Scrivener, or the Company. This charge was amended on May 13 to additionally allege

[1] Unless otherwise specified all dates herein occurred in 1968.

violations of Section 8(a)(4) of the Act. The Regional Director of Region 17 of the National Labor Relations Board, herein called the Board, issued a complaint and notice of hearing in this case on May 17 alleging that Respondent violated: (1) Section 8(a)(4) of the Act by the discharge of four employees on April 18 and the refusal to reinstate three of them; (2) Section 8(a)(3) by discharges of three employees on March 19 and 20, layoffs of two employees on March 27 and refusals to reinstate one of these employees; (3) Section 8(a)(5) of the Act by refusing to bargain with the Union on and after March 18; and (4) Section 8(a)(1) by interrogating employees, threatening them with loss of employment, and blackballing them from other employment and encouraging employees to join a union of Respondent's choice and polling them to ascertain their union sympathy.

Respondent's answer admits that the Union is a labor organization, that Respondent is a sole proprietorship in Springfield, Missouri, and that the charges were filed and received but denies both that Respondent is subject to the jurisdiction of the Board and the remaining allegations of the complaint.

The threshold question here is whether without discretionary jurisdictional standards being met, the Board should assert jurisdiction on a statutory basis since the complaint alleges interference with employees because they met with and gave evidence to a Board agent conducting the investigation of this case. If this question is answered affirmatively there are subsidiary questions such as the reasons for termination of employees and the motivation of the other acts alleged, the determination of which is based mainly on the credibility of the witnesses.

All parties were afforded full opportunity to participate and to examine and cross-examine witnesses in the hearing held June 25 and 26, at Springfield, Missouri. All parties have filed extensive briefs which have been carefully considered.

Upon the complete record in this case and on my evaluation of the reliability of the witnesses based both on the evidence received and my observation of their demeanor and on the fact that certain portions of General Counsel's evidence are undenied and therefore stand uncontradicted by Respondent, I hereby make the following:

Findings of Fact

I. The Business Involved and the Labor Organization

Respondent Robert A. Scrivener does business as A A Electric Co. and is a sole proprietor maintaining his place of business in Springfield, Missouri, where he is primarily engaged as an electrical contractor installing wiring and electrical fixtures, etc., in residential construction. During 1967 Respondent's gross revenues totaled $68,938.81 and during such time Respondent purchased from Graybar Electric Company goods and materials used in electrical contracting work in the amount of $23,126.62.

Mr. George A. Griffin, branch manager of the Graybar Electric facility in Springfield, Missouri, for the past 13 years, testified that he had been a branch manager for some 2 years prior to that and was familiar with the names and origins of the supplies and equipment maintained and sold in Graybar's Springfield facility. He testified that Graybar is a nationwide company with 147 locations and that

it had done and was currently doing business with Respondent. Graybar's Springfield facility is under a regional office in Kansas City which maintains audited copies of the accounts of the customers of the local Graybar facilities in its region. The local facilities such as Springfield maintain unaudited copies of the sales tickets or purchase orders of each customer and so have a current minimal figure of each customer's account.

Mr. Griffin testified that in response to General Counsel's request, he had contacted his regional office in Kansas City and that the business records maintained there reflected that Respondent's purchases in 1968 until shortly prior to the hearing amounted to approximately $18,000. Mr. Griffin further testified that he had checked the records kept locally and for a 7-week period, March 21 until May 9, determined that Respondent's purchases amounted to $4,769.33 as a minimum figure.

Griffin was asked to estimate from his knowledge of the stock maintained locally by Graybar the percentage of materials which originated outside of Missouri and answered that about 95 percent of the goods came from out of State. He was then asked to use the copies of the purchase orders available to him and estimate the percentage of goods bought by Respondent which originated from out of State and estimated that approximately 90 percent of Respondent's purchases were of goods which originated outside of Missouri. From these figures for less than half of 1968, it would appear that projected for the full year Respondent's purchases from this one supplier, Graybar, of goods which originated from out of State would be in excess of $30,000.

Griffin's knowledge of the origin of the goods sold at this facility is based on company records, his

knowledge of the business, and his management of this facility for a number of years. His estimates are therefore entitled to weight by me and I credit them.

I conclude and find that Respondent does not meet the Board's discretionary jurisdictional standards, but that the amounts involved are clearly more than *de minimis* as the Board has determined that standard before, and that Respondent's purchases of goods shipped in interstate commerce has an impact on and affects interstate commerce, and that statutory standards for Board jurisdiction have been met here.

General Counsel and the Charging Party urge the Board to exercise jurisdiction here because a part of this case involves the question of whether Respondent has abused Board processes and violated the statutory right of individuals to resort to Board processes by discharging individuals in violation of Section 8(a)(4). They contend that in such a situation public policy demands that the Board exercise its jurisdiction to the fullest extent possible.[2]

Respondent argues that the jurisdictional facts are *de minimis* at best (a point I have rejected), and that it would be unjust and a violation of the constitutional guarantees of equal protection and due process for the Board to assert jurisdiction here. Respondent's latter claim as set forth in its brief alleges that small businesses such as this can be made to answer for violations of the Act merely by the General Counsel using the ploy of alleging that Section 8(a)(4) of the Act has been violated while such a company would be denied an opportunity to use

---

[2] See *Philadelphia Moving Picture Machine Operators' Union Local No. 307 I.A.T.S.E. (Velio Iacobucci)*, 159 NLRB 1614, and *Eugene Pedersen* v. *N.L.R.B.*, 234 F. 2d 417 (C.A. 2).

the election processes of the Board. This argument begs the issue of the *Pederson* case, *supra*, since assertion of jurisdiction ultimately will be based on the determination of whether such a company has violated Section 8(a)(4) of the Act. If after hearing the evidence the answer is that the company has not breached Section 8(a)(4) then there is no reason to assert jurisdiction in vindication of public policy, and jurisdiction of the matter would be declined.

In furtherance of its position Respondent argues from the facts of the instant case and from decisions it has interpreted that a violation of Section 8(a)(4) can not be shown here and that the complaint should be dismissed. As will be seen herein, I have determined that Respondent did violate Section 8(a)(4) of the Act, thereby interfering with Board processes and in violation of public policy and accordingly recommend that the Board assert its statutory jurisdiction in this matter.

Accordingly, I conclude and find that it will effectuate the purposes of the Act for the Board to assert its statutory jurisdiction over this Respondent, since Respondent's activities affect interstate commerce and do have an impact thereon.

Respondent admits and I find that Local 453, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practices

A. *Background and Undisputed Facts*

Robert Scrivener testified he has been an electrician since 1936 and has belonged to either the Union herein or to another IBEW local in Tulsa, Oklahoma, for approximately 20 years. Approximately 3 years

ago Scrivener started his present business as A A Electric Co., which he runs from a shop next to his home in Springfield, Missouri. His wife assists him by apparently handling the bookkeeping and clerical functions. Materials and supplies are kept at the shop and the employees report there to load their trucks and receive their assignments, and return there after work.

Although Respondent's principal work has been in the area of residential construction, Scrivener has had some commercial work such as wiring apartment houses. In mid-March Scrivener had work in a number of single-family homes, one or more duplexes, and at least one apartment house. At that time he had six employees; three journeymen, Wesley Smith, an employee since August 1966, Albert Wilson from early 1965 until early 1966 and from February 1967 on, and Bill Cockrum since February 1968; and three apprentices or helpers, Claude Sanders employed from February or March 1967, Charles "Don" Cockrum employed on 4 or 5 different occasions over the 3-year period with the last beginning January 1968, and Boyd Perryman.

There is disagreement as to the manner of termination of the employees on various dates although there is no disagreement as to the dates they ceased working for the Company nor that Respondent hired two new employees after learning of the union activities of five of the six employees it had in mid-March. Further there is disagreement regarding some of the statements Scrivener is alleged to have made but there are certain remarks and actions of his which are undenied.

The parties agree that the unit appropriate for collective bargaining at Respondent is "All employees employed by the Respondent excluding office

clerical employees, guards and supervisors as defined in the Act."

The Union and the General Counsel claim that the makeup of the unit as of the morning of March 19, the time when the union representatives met with Respondent and orally claimed a majority and demanded recognition, is the proper one on which to determine majority status. Under this theory the unit consisted of the six employees named above.

Respondent at the hearing took the position that the unit for purposes of determining majority should consist of the six employees named above plus the employees it had at the time of the hearing. These additional employees would be journeyman Clyde Hunt, hired by Scrivener on March 19 after his meeting with Union Officials Jack Moore and May Edwards, apprentice Jim Statton hired by Scrivener on March 20 or 21, Richard Claybaugh,[3] an employee of another firm who works for Scrivener when he wants to do so if Scrivener has work available, and Albert Hunt,[3] Clyde Hunt's son, who works part time during school vacation in the summer when he wants to work and Scrivener has work available. Respondent also claims that Clyde Hunt and Claybaugh had both worked before March 20 and should be included in the unit if March 20 were the appro-

[3] Under applicable Board law neither Claybaugh or Albert Hunt qualify as employees entitled to a voice in determining a bargaining agent since both from Scrivener's description are casual employees working only when they felt like it and then only if Respondent has work available. Additionally, Albert Hunt would seem to be further disqualified as a summer part-time employee with no expectation of future employment. Accordingly, I conclude and find that neither of them can be considered as employees in determining the employee complement on which to determine majority status.

priate date for unit determination. Finally at the hearing Respondent said the Board should determine the appropriate date and the employee complement.

In its brief Respondent changes its position completely on these matters and asserts that the Union did not make a true legal demand on it during the March 19 meeting, since it claims the Union demanded it then sign a contract containing nonmandatory bargaining subjects. The first legal demand, according to its theory, occurred on March 21, when it received the Union's letter containing a demand and alleging that it had violated the Act. Respondent states that on that date its employee complement consisted of Claude Sanders, Don Cockrum, Boyd Perryman, Clyde Hunt, Jim Statton, and Richard Claybaugh, and that only Cockrum had signed a union card of this group.[4] Under its theory employees Bill Cockrum, Wilson, and Smith had separated themselves from its employ on March 20 and were not part of the unit.

As can be seen from Respondent's shifting positions, it did not have an original theory in regard to these questions either when it refused to bargain with the Union, or at the trial of this matter, but rather has fashioned a theory to suit its version of the facts following the hearing.

Respondent however maintained one other position relevant to the refusal-to-bargain allegation and that is that when he was shown the five union authorization cards, Scrivener claims he had a good-faith doubt as to the genuineness of the signatures. His contradictory testimony in regard to this point and my decision that Scrivener acted in bad faith will be set forth below.

---

[4] Respondent forgets that Sanders had also authorized the Union to represent him by signing an authorization card.

In their testimony it appeared to me that Wilson, Smith, Sanders, and Bill Cockrum testified straightforwardly and tried to state the facts as they remembered them. Scrivener however testified to different things depending on who was questioning him and contradicted himself on a number of items such as whether he did or did not tell Jack Moore he doubted the genuineness of the signatures on the union authorization cards. Further Scrivener's undenied actions contradicted some of his testimony.

As to employee "Don" Cockrum I have determined to credit his testimony where it is substantiated either by his affidavit or other independent testimony. Cockrum has been placed in a peculiar position by the circumstances existing at the time of this hearing. Sometime after his layoff on April 18, Cockrum was arraigned on a criminal charge and had a preliminary hearing. Through the intercession of "Don" Cockrum's "in-laws" Scrivener rehired him and through or with Scrivener's acquiescence, he met with Respondent's Attorney Jones, who was at that time Respondent's counsel in this matter, and retained him as his counsel in the criminal action. Cockrum's retention of Jones occurred after the issuance and service of the complaint in this matter and despite the fact that the complaint contained an allegation that "Don" Cockrum had been discharged by Respondent in violation of Section 8(a)(4) of the Act. When these facts came out during the hearing, Attorney Jones drew from Cockrum an agreement that Jones had told Cockrum that the two matters must remain separate and distinct.

I feel that this situation placed Cockrum in a most unenviable position when he was prepared, according to his affidavit, to testify against the Employer who had now rehired him at the behest of Cockrum's

"in-laws" with a criminal charge hanging over him. Here he was to testify against the interest of this employer who is represented by an attorney upon whom Cockrum relies to defend him in a criminal action. The feelings of mortal man and his emotions can not be separated or compartmentalized to the degree Attorney Jones suggested to Cockrum and to expect such is asking the impossible of fallible beings, as Cockrum's testimony amply demonstrated. I feel that both Attorney Jones and "Don" Cockrum erred in their judgment in creating such a situation.

After commencing his testimony "Don" Cockrum, according to counsel for the General Counsel, answered questions differently and contrary to the manner in which he had responded in preparation for the case and contrary to his affidavit and General Counsel claimed surprise. On the basis of this claim and Cockrum's general demeanor, General Counsel was allowed to proceed with some leading questions. It became evident to me that Cockrum was seeking to distort and change his testimony to place Respondent's case in a more favorable light. When Cockrum identified the affidavits he had given and was reminded of the oaths he had taken in giving the affidavits and as a witness in this hearing, his testimony began to agree with the previous affidavits in all but one major respect. That point will be discussed *infra*. Where Cockrum's oral testimony is contrary to the interest of Respondent and in accord with his sworn affidavit, I credit it, and where his testimony is contrary to his verified affidavits and the testimony of others, I must discredit his oral testimony under these circumstances. Respondent has no basis for complaint of such credibility resolutions since they result from a situation created by Respondent or Respondent's counsel.

Recitation of the events hereafter is based either on uncontradicted testimony or contradicted testimony where I have resolved credibility conflicts in accord with the observations made above and the weight of the evidence.

B. *The Events*

1. On March 15, while working at a jobsite on Pinehurst with his helper Claude Sanders, Wesley Smith was approached by Scrivener who, after looking over the jobsite, asked him to come to the truck. There Scrivener broached to Smith the proposition that the Company's employees join District 50,[5] with the result that they might get a lot of commercial work and have some residential work as fill-ins rather than have mainly residential work. Scrivener asked whether Smith would talk to the men when he got to the shop that evening about going into District 50. Smith agreed to do so.

I find and conclude that Respondent by this action encouraged his employees to join a labor organization of his choosing and that he thereby violated Section 8(a)(1) of the Act.

2. Albert Wilson testified that when he returned to the shop on the evening of March 15, all the men had gotten there but Smith and Sanders. Scrivener told the men to hang around a few minutes that Smith wanted to talk to them but that he could not say what it was about because he was not supposed to know. A few minutes later Scrivener told the men that it concerned their joining District 50.

When Smith came in he asked each of the men what they thought about joining the Union. Most of

---

[5] District 50 is District 50, of the United Mine Workers of America which organization has an office in Kansas City.

the men indicated that they would join District 50 and others indicated that they would go along with the majority. On conclusion of this polling of the men as to the union sentiments, Smith turned to Scrivener and told him "there it is." Scrivener told them that several electrical contractors in the vicinity belonged to District 50 and were doing real good. Wilson mentioned that there was a picket on one of the companies at that time. Scrivener said he would either write or go see District 50 in Kansas City. Some further discussion was had among the men.

I conclude and find that Smith was acting as an agent of Scrivener in conducting this poll of the employees to ascertain their union sympathy and that Respondent thereby violated Section 8(a)(1) of the Act.

3. In the evening of March 15, Bill Cockrum telephoned Scrivener and asked what he thought of Local 453. Scrivener replied he would not join with Local 453 although he had been a member of that Union at one time, and that he could not afford to belong to the National Electrical Contractors Association, herein called NECA, and pay the 2-percent assessment.

Later that evening Cockrum called Ray Edwards of Local 453 and discussed the situation, asking if Local 453 was willing to represent them. Edwards said they would and a meeting was arranged for Monday, March 18. Bill Cockrum thereafter talked to Wilson and others concerning the situation and meeting with Local 453.

4. On the evening of March 18, Bill and "Don" Cockrum, Smith, Sanders, and Wilson met with union representatives, Moore and Edwards, at the union hall. The men told Moore and Edwards of the events and said they did not want to join District

50. Moore said Local 453 would represent them and asked them to sign union authorization cards saying he knew Scrivener and would see him and if necessary show Scrivener the authorization cards to prove he was authorized to represent them. He added that if Scrivener would not agree to recognize the Union he could use the cards to petition for an election. Moore then answered questions as to their becoming union members and assured the five men that they could take the wireman's examination and there would be no problems regarding their ages. All five men then signed union authorization cards.

After the meeting Moore called Scrivener and asked to meet with him the next day. Scrivener agreed to come by the union hall the following morning.

5. Moore and Scrivener had known one another for 20 years or so and talked about a number of topics on Tuesday morning, March 19, before getting to the reason for the meeting. Moore told Scrivener the Union represented a majority of Scrivener's employees and wanted a contract with him. Scrivener said that he doubted that the Union had a majority of his employees. To resolve Scrivener's doubt Moore showed him the signed cards. Scrivener said Moore had one card more than he had employees. Moore said it was just the opposite that Scrivener had one more employee, Perryman, who had not signed a union card. Edwards asked Scrivener which card he was questioning and Scrivener replied "Don" Cockrum. Edwards said he had seen Cockrum on the job the previous day. Scrivener acquiesced saying he guessed Cockrum was working.

Scrivener asked if Moore wanted him to send the men to the union hall. Moore said no that Scrivener was to keep the employees, that they would work out

a contract. Scrivener asked if he could get additional men from the hiring hall if he was to expand his business and Moore assured him he could. Scrivener said he was going to talk to his attorney and would get in touch with Moore thereafter and that he was not sure about an agreement since there was another organization that the people might be tied to. Moore said there was no fear of that, the IBEW was the only organization involved and he had this information from the people themselves. Scrivener asked about a contract and Edwards gave him a copy of the construction agreement.

Scrivener testified that Moore gave him a deadline of 6 p.m. to sign the union contract and that Moore said he would replace all of Scrivener's men with good men from the union hall.

I have no doubt that the Union would have liked to have Scrivener sign a standard contract as soon as possible, but I do not believe Scrivener was given a deadline nor that Moore and Edwards said Scrivener's men would be replaced by men from the union hall. I credit the testimony of Moore and Edwards against Scrivener, noting further that such tactics would virtually make it impossible for the Union to organize any company if the employees who sought to be represented would immediately be replaced by other union members upon the signing of a union contract. Such a self-defeating tactic would become known quickly in the trade and would halt any organizational activities the Union attempted.

It is clear that Scrivener reported such statements to employees thereafter, seeking thereby to frighten them away from the Union in an attempt to undermine the Union's majority. I conclude that Scrivener's testimony is not to be credited.

In its brief Respondent claims that the testimony taken as a whole demonstrates that Scrivener's claim that Moore demanded he sign the particular agreement, join NECA and pay it a 2-percent fee is borne out by the fact that the Union agreed that all of its signatories in the area are either members of NECA or have agreed to be bound by that contract. The construction agreement calls for a payment of 1 cent an hour towards an apprenticeship and training program, a further amount of 1 percent of the gross monthly payroll to be paid into a benefit fund, a contribution of 15 cents an hour for payment of a health and welfare fund, and an amount of 4 percent of the gross payroll toward a vacation fund. Respondent has not made clear whether the 2 percent it speaks of is a part of the above amounts or is a membership fee for NECA or just what it represents. I can only determine from the evidence before me that the Union does have signatories who agree to be bound by the terms of the NECA contract and are not NECA members and do not assume the obligation of NECA membership or dues and fees. I find that the Union did not demand that Respondent join NECA as a part of any contractual agreement between Respondent and the Union and that Respondent's claim in this direction is not true.

6. During March 19, Scrivener visited the jobsites several times and first appeared at the jobsite where Wilson, Smith, Sanders, and Perryman were working shortly after his meeting with Moore and Edwards.

Wilson testified that it was about 10:30 a.m. when Scrivener came in the apartment house jobsite and said, "Bud did you guys sign those cards at the hall last night?" Wilson replied "Yes," and Scrivener asked what they wanted to do it for. Wilson said

they thought Scrivener wanted a union. Scrivener said no. Wilson said Scrivener was talking District 50 awfully strong. Scrivener said he didn't want it and asked if they knew what they had done. Wilson said they were trying to better themselves. Scrivener said that he had just come from the union hall and that Jack Moore told him that if they organized Scrivener, that Scrivener could not keep his present employees, and that the Union would replace them with good men. Scrivener said the men knew they could not go to work for another shop and he was telling them this for their own good. Wilson said he had known Moore for several years and could not believe Moore said that. Smith and Perryman came in the room and Scrivener noted that Perryman was the only one who had not signed a card and said something about letting everyone go. Smith and Wilson told Scrivener they were going through with the Union.

7. After lunch Scrivener came back to the apartment and asked Wilson if he had seen Doyle Luce, of Aton Luce Electrical Contractors. Wilson said he had not. Scrivener said Luce was supposed to come by and give him a bid on finishing the apartment job. Scrivener told Wilson and the others to get everything roughed in, that they were going to have to get somebody else to finish the job and at quitting time they were to take all the materials and supplies back to the shop and to wait there because he wanted his lawyer to talk with them.

8. After the morning discussion Scrivener spoke to Sanders saying he understood they had signed cards at the union hall. Sanders said that was right. Scrivener said he had not thought the boys would do him that way and that Moore told him if he signed a contract with the Union they would not use any of

the five card signers. Sanders said that if the Union operated that way he did not want any part of it.

I conclude and find that Scrivener's questioning of the employees as to their signing union cards and threatening that they would lose their jobs as a result of their activity as set forth in 6, 7, and 8 above violate Section 8(a)(1) of the Act.

9. "Don" Cockrum rode to the shop with Scrivener after work on March 19. Cockrum orally testified that during the ride Scrivener said he might have to lay some of the guys off. He continued that if they would have come and talked to him about it he might have reconsidered but they went up there (to the Union) and signed up without talking to him. Scrivener said he would probably let Don's brother go and that the men had gotten him into a mess.

"Don" Cockrum's testimony concerning Scrivener's statement about another electrical contractor is contrary to his affidavit. Cockrum stated orally that Scrivener told him electrical contractor James Mitchell was working across the street from the jobsite that day and in conversing with him, Mitchell told Scrivener that if Scrivener's men came out there looking for a job Mitchell was going to offer them $1.25 an hour (the minimum wage and a sum far below what the men apparently were receiving).

"Don" Cockrum identified his affidavit and admitted he had sworn that its contents were true. The affidavit recites that on the trip with Scrivener to the shop, Scrivener said he would probably have to let everybody go because they had gotten him into "'a hell of a mess," and he was going to have to let Don's brother go for sure since he was the ringleader, and he would really be in a mess if he earned a little bit more money (apparently referring to the Board's jurisdictional standards). Cockrum's affi-

davit said Scrivener told Cockrum he had called James Mitchell Electric and told Mitchell that if any of Scrivener's employees called him for a job that Mitchell was to pay them $1.25 an hour even if he could use them, and that he had called some other contractors and they wouldn't be needing any help. Scrivener said the employees had made their beds and now they could sleep in them.

"Don" Cockrum stated the affidavit was in error and that Scrivener had not called Mitchell but that Mitchell had called Scrivener. When asked to explain why he would sign and swear to a statement containing such a distortion and particularly where he had initialed a correction right in the middle of this particular section, Cockrum replied that he did not read it over carefully. Thereafter Cockrum admitted that Scrivener said the following two sentences reported in his affidavit: "He said he had called some other contractors and they wouldn't be needing any help. He said the employees had made their bed and now they could sleep in it."

Taking the testimony as a whole and noting again the position in which Cockrum was placed by his actions and those of Respondent and Respondent's attorney, I find that the version of the conversation concerning Mitchell contained in the affidavit is the true version of what occurred and that this was at least partially corroborated by Cockrum. It would not make sense for Scrivener to have contacted other employers to find out whether they would use his men and at the same time not have contacted Mitchell in regard to this same question.

I conclude and find that Scrivener in his conversation with Cockrum on the afternoon of March 19, violated Section 8(a)(1) of the Act, by threatening

employees with loss of their jobs because of their union activity.

Scrivener's statements to Cockrum about the other electrical contractors was an implicit threat of blackballing the men for their union activities and was the forerunner of and renders credible Smith's version of a telephone conversation between Scrivener and himself on March 20 in 12 below.

10. The employees got to the shop about 4:15 p.m. Scrivener opened the meeting with the men after Attorney Jones' arrival by stating Moore told him he would not be able to use the five men he presently had employed and that he would replace them with good men. Scrivener said there was no way he could be forced to join Local 453 because he did not come under the Board's jurisdictional amount of $50,000. Jones and Scrivener apparently looked over some tax forms and agreed on the absence of the jurisdictional amount. Jones then talked to the men mentioning that the initiation fee for Local 453 was something like $300. Bill Cockrum spoke up saying Jones was wrong, that it was $50. Jones said he might have been thinking of the initiation fee for the Sheetmetal Workers.

After some more discussion, the three journeymen, Smith, Bill Cockrum, and Wilson advised Scrivener that they wanted Local 453 as their bargaining representative. Scrivener, who admitted he had made up his mind earlier in the afternoon to discharge the men and had asked his wife to make up their checks, got their checks from the office, brought them out, and started to hand them to the three journeymen. Bill Cockrum told Scrivener he wanted to know whether or not he was fired before accepting the checks. Scrivener turned to Attorney Jones and asked what he should say. Jones said he would let

them go and let Jack Moore handle them from the union hall. Scrivener nodded his head affirmatively to Cockrum and gave the three men their checks. They picked up their tools and left the shop. While walking towards their cars, Scrivener came out of the shop and said they were welcome to come back the next morning if they wanted to go to work.

11. On the morning of March 20 all the men reported for work and were given assignments by Scrivener. Smith and Bill Cockrum were scheduled to go to the apartments on South Florence Street and were loading their trucks with materials when Scrivener came outside the shop and talked to them and Wilson. Scrivener said there was one thing his attorney wanted to know and that is whether they were affiliated in any way with Local 453. The three men said they were. Scrivener said that he could not use them. The men loaded their tools and left.

I conclude and find that the discharges of Bill Cockrum, Wilson, and Smith on March 19 and 20 were violative of Section 8(a)(3) and (1) of the Act. I do not credit the tortured explanation of Scrivener that he did not want the men to get in trouble with the Union and was allowing them to leave for better jobs.

12. On the evening of March 20, Smith received a telephone call at home from Scrivener. Scrivener told Smith he woud like him to come back to work and hated to see Smith's family suffer on account of this thing. Scrivener said the other contractors such as Balmer, Ivan Franks, and Jim Mitchell, had gotten together to keep them from working and that he would not find a job, while they would furnish Scrivener with men if he needed them. Smith told Scrivener he was planning on going through with the Union because he felt he could better himself. Scri-

vener said that if he wanted to change his mind he could come back to work within 2 weeks.

I conclude and find that Scrivener in this conversation violated Section 8(a)(1) of the Act by threatening the employees with blackballing because they had chosen the Union as their collective-bargaining agent.

13. Following the Union's demand letter of March 20, in which it protested the discharge of the three employees on March 19 and 20 and said it was filing a charge, the Union filed a charge of 8(a)(1), (3), and (5) violations on March 21. Respondent wrote a letter to the three dischargees dated March 22, which they did not receive until Monday, March 25.[6] This self-serving letter claims that Respondent has

---

[6] The letter follows:

Gentlemen:

This letter is written to clarify the fact that I have not discharged either one of you and you are all free and welcome to work for me as usual at any time, whether or not you are members of the I.B.E.W. Union or any other union.

I will be glad to have any or all of you work as usual, so long as I have work available which you can do, and I would be glad to have you report to work Monday morning as usual.

It was never my intention to discriminate against you in any way for any interest you may have in any union. However, I did feel it was my duty to tell you what had been told me by Mr. Jack Moore of the I.B.E.W. Union, when he demanded me to sign a contract with him, to the effect that if I signed such contract I would be required to hire all men through his hiring hall and that Mr. Moore would not permit you men to work for me, in all probability, as you would have to stand in line in the hiring hall procedure and I would have to hire the men who had first signed in the hiring hall were without jobs.

not discharged any of the three and that they are free to report back to work on Monday morning, March 25. After contacting the Union for advice, the three men reported back for work on Tuesday, March 26, and worked that day and March 27. Cockrum left work early because of an injury to his son and when Smith and Wilson reported to the shop that evening Scrivener told them they were caught up and he would have to lay two of the three of them off for a few days. A suggestion was made that straws be drawn between the three. Smith and Cockrum were laid off following the drawing and Wilson was kept on along with new employees Clyde Hunt and Jim Statton.

14. On April 1, Wilson was sick and Scrivener called Smith, according to Wilson at his suggestion, and had Smith report back to work. Smith and Wilson continued to work until April 18 with the remainder of the employees. At that time everyone was back to work except Bill Cockrum.

15. On April 17, a Board field examiner met with Scrivener for several hours to discuss the charge against the Company, as well as the Company's contention made in its letter to the Regional Director of March 22, that it did not come within the jurisdiction of the Board.

That evening the field examiner met with Bill and "Don" Cockrum, Smith, Sanders, and Wilson at the union hall. The field examiner interviewed the five employees that night and only took affidavits from three of the five due to the lateness of the hour.

16. On the following morning, April 18, when Wilson went to work, Scrivener motioned him into the office and asked "Did you guys meet with the Labor Board last night?" Wilson answered yes. Scrivener said "They sure don't talk much do they?"

Wilson replied no and went on out to gather material to go to the job. Later, while he and "Don" Cockrum were getting ready to go out, Scrivener came up to him again and said, "You say you met with the Labor men last night?" Wilson answered "Till about 11 or 11:30." Scrivener said "That old boy sure don't tell you nothing." Wilson answered "No Bob, he's a journeyman."

While Sanders was at the shop getting ready to go to work on April 18, Scrivener came up and asked him, "Did the boys find out anything last night?" Sanders answered not that he knew of.

Scrivener did not directly deny the testimony of Sanders and Wilson but rather testified that he had no knowledge as to whether any of the men talked to the Board field examiner prior to laying them off on April 18. He maintained that the first time he learned who had talked to the Board field examiner was when Wesley Smith told him about it. Asked when that was, Scrivener said "I would say on April 20." According to Scrivener, Smith told him the identity of the men who spoke to the field examiner while Smith was at the shop getting ready to go to work. Scrivener was not able to say where Smith was working that day and was not completely sure of the date.

Smith was not questioned about this conversation, it first being mentioned during Respondent's defense. Scrivener's guess of April 20 as the date of the conversation is obviously incorrect since Smith was laid off on April 18 and did not work for Scrivener until called back on May 4. If the conversation took place, and it seems possible that it did, then it must have occurred in the morning of April 18, the same day Scrivener laid Smith and the other men off.

Common sense would indicate that when the Board field examiner was in the area investigating the case and interviewing Respondent and the case involved a claim of majority and individual discharges, that the Board examiner would investigate the charging party's case by interviewing the dischargees and the individuals who made up the union majority. So it should have been no secret from Scrivener that the Board field examiner would meet with the five union card signers.

I find from the testimony of Scrivener, Sanders, and Wilson that Scrivener on April 18, knew of the employees meeting with the field examiner and the identity of the men who were interviewed by the field examiner on the evening of April 17.

I conclude and find that Scrivener's questioning of Wilson and Sanders on April 18 concerning their meeting with a Board field examiner violated Section 8(a)(1) of the Act.

17. On the afternoon of Thursday, April 18, after finishing work, the men reported back to the shop. Scrivener told Don Cockrum, Wilson, Smith, and Sanders that he had no work for them and if something came in over the weekend he would call them. He asked if they wanted their checks to save them a trip on the following Friday morning. The four men said yes and Scrivener gave them their checks. Clyde Hunt, Jim Statton, and Perryman were not laid off by Respondent and worked thereafter.

Following this layoff Sanders was never called back to work. Smith and Wilson were called back on May 4 and as noted earlier "Don" Cockrum returned to work in the early part of June.

Thus, on April 18, Scrivener laid off the remaining four employees who signed union authorization cards, having previously laid off and not recalled Bill Cock-

rum. In contrast he retained on his payroll Perryman, the sole remaining employee of those employed when the union organization started, and Hunt and Statton, none of whom had any part in the union organization. In fact Hunt and Statton were obviously hired to replace some of the union-affiliated employees.

Scrivener's explanation of this layoff was that the other men were retained on jobs they had started and that he was short of work. Scrivener's explanation is not convincing. The fact is that the men were on jobs at the time and that there was some other work such as the apartment house still to be done. Further Scrivener assigned men to the jobs and could have made assignments so as to retain senior men if the amount of work available was decreasing. In making these layoffs Scrivener was retaining Statton, a man with apparently no previous experience who had been on the job less than a month while laying off more experienced helpers. Further the fact that a man had started a particular job would not seem to make any difference since the men would be following wiring diagrams in wiring a house or apartment and in any event a journeyman electrician should be capable of picking up a job at any point from any other journeyman. Certainly this was done at times when men were ill, as for instance on April 1, when Wilson was ill and advised Scrivener to call in Smith to work which Scrivener did. Certainly it would have been to Scrivener's benefit to retain more experienced helpers.

Scrivener is entitled to run his business in any manner he desires as long as it does not discriminate unlawfully against his men. His explanation as to why he laid these four men off was not clear or convincing and seems to be contrary to commonsense

and good business practice. In view of the parallelism of the union activities of these men and Scrivener's layoff of them, his reasons for the layoff are not sufficient to overcome the *prima facie* case presented by the General Counsel.

In determining motive and reaching this conclusion I have noted the circumstances of the prior discharges of his employees and Scrivener's being assured by his attorney that he was not subject to the jurisdiction of the Board. The men's union activities were not open or dramatic after that. Here a new event occurs, the Board field examiner is investigating the charge and even after the harsh discipline of discharge for daring to want a union of their choice, the men go to the union hall and discuss Scrivener's actions relating to the charge in interviews with the Board field examiner. Scrivener knowing of his employees meeting with the Board field examiner and being aware of the advice that he was not subject to Board jurisdiction, summarily laid off the remaining four employees in a rather evident attempt to demonstrate that he controlled their working conditions and to punish them for having the temerity to meet with and give evidence to the Board field examiner.

The circumstantial evidence of the event is sufficient to find that this is why Scrivener engaged in retaliation against his employees. It is not necessary that we have a confession from Scrivener to reach this result, nor that we have statements from him to indicate this is why he laid off these employees. The evidence of Scrivener's quick reaction to the concerted and union actions of his employees in the past in threatening to discharge and in discharging them, added to his hiring of new employees and his retention of them in subsequent layoffs in preference to the "union minded" employees, along with his quick

reaction in laying off the four employees prior to the end of the workweek and on the same day he determined they met with the Board field examiner and while there was work for them to do, plus his determination that he was not subject to the Board's jurisdiction, and his lack of credibility in testifying, is sufficient for me to find that at least one of his reasons, and I believe it was the main reason, for laying off these four men was in retaliation for their meeting with the Board agent to give testimony regarding the charges concerning them against Scrivener and further to discourage any other employees from so doing. The immediate parallel of the factual situation is too close to be coincidental.

Respondent states that these layoffs could not be found as violations of Section 8(a)(4),[7] since the employees had not filed charges nor had they appeared in a Board proceeding and given testimony, and cites as his authority *N.L.R.B.* v. *Ritchie Manufacturing Company*, 354 F.2d 90 (C.A. 8).

With due deference to the Eighth Circuit, it appears that the Board has not so narrowly construed Section 8(a)(4) but has found that the Section is broad enough to encompass a situation such as this and I must follow the Board's line of decisions.

Section 8(a)(4) first comes into play when a charge is filed with the Board. Thus an individual filing a charge becomes protected by the Act and if he is thereafter discriminated against because he filed the charge, Section 8(a)(4) has been violated. In the instant situation the Union acting as the bargaining agent for the employees filed a charge in

[7] Section 8(a)(4) provides that "it shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

their behalf alleging that three of them were discriminatorily discharged and that all of the employees were discriminated against by Respondent's refusal to bargain with the employees collective-bargaining agent. Thereafter the Board in exercising its statutory function sent a field examiner to secure facts concerning this charge to determine whether it had merit or not. The field examiner interviewed and discussed the charge and the jurisdictional aspects with Respondent Scrivener and thereafter interviewed the five union card signers and took affidavits from them so that the Regional Office might analyze the case to determine whether the charge had substance. I have found above that Respondent laid off these employees in retaliation for their meeting with and being interviewed by the field examiner and giving affidavits to him, all in furtherance of the Region's investigation of this charge.

I conclude and find Respondent's discharge or layoff of these four individuals in these circumstances violated Section 8(a)(4) of the Act. To accept Respondent's theory of Section 8(a)(4) would be to place a premium on form rather than substance and what seems to be clear intent. The four 8(a)(4) dischargees were already the subject of a charge involving discharge of two of them and refusal to bargain as to all of them in that the union card signers constituted five-sixths of the bargaining unit at the time of the demand. The Union which was their bargaining agent filed the charge in their behalf. To follow Respondent's theory it would be necessary for each of these men to have signed the charge individually in his own name. Clearly, anything that a principal can do, an agent with authority can do for him, and here as the bargaining agent for these men, the Union had that authority.

Secondly, the protection afforded by Section 8(a)(4) would seem not meant solely for those who signed the charge but rather to be invoked at the time the charge is filed, so that employees who are called on for information by Board agents will not be discriminated against by their employers because they assisted the Board in the exercise of its statutory function of determining the merits of a charge. To suggest otherwise would be to say that the Board must investigate the factual background of charges and that a respondent is entitled to hinder that investigation by discharging each and everyone who appeared and talked to the Board agent, as long as the employee had not performed the ministerial act of signing a charge. Clearly where Congress gave the Board the authority to investigate and determine whether charges have merit, it intended that the Board not be hindered in so doing and established the filing of the charge as the initial guide post rather than as a *sine qua non*, for the protection of those who assisted the Board, sometimes reluctantly, in the performance of its statutory functions.

Thus my conclusion that Respondent violated Section 8(a)(4) rests on two points: (1) that the signer of the charge was the agent of these individuals and, (2) that Section 8(a)(4) must necessarily apply to employees who are interviewed by and give affidavits or statements to Board agents during the Board's exercise of its statutory function to investigate and determine the merits of charges filed with it.

The Board has in essence made such findings in several cases, the most recent of which is its affirmance of the Trial Examiner's decision in *Manila Manufacturing Co.*, 171 NLRB No. 151.

Respondent's brief contends that since the complaint says nothing about Wilson's termination on

May 10, the separation on that date cannot be contended as illegal.

According to Wilson's testimony, after being recalled on May 4, he worked until the close of business on May 10, when Scrivener told him there was no more work for him to do, that they were caught up and not to come back to work. Respondent's examination of Wilson would indicate that Respondent felt that Wilson had quit. However, Respondent offered no direct testimony which would demand such a conclusion.

The complaint alleges discharges of Wilson, along with others, on March 19 and 20 and April 18, as well as refusals to reinstate Wilson since on or about April 18. With Respondent's demonstrated union animus and crediting Wilson, I do not credit Respendent's claim that Wilson quit but determined that he was laid off once again and as is usual with layoffs is entitled to recall by Respondent, assuming here that the layoff was nondiscriminatory. In view of Respondent's past treatment of Wilson, I consider this short term employment by Respondent more in the nature of interim employment and not full and adequate reinstatement to which he and the others are entitled.

The problem of available work is one with which Respondent is intimately connected since Respondent was able by adjusting its bids on available work to either try to get it or not. Similarly Respondent apparently sought to subcontract the work it had on the apartment house to the Aton Luce Company. So in considering availability of work, there might be a question as to whether Respondent manipulated its work in order to have an apparent reason for laying off employees.

In regard to the 8(a)(3) allegations concerning the layoff of Bill Cockrum and George Smith on March 27 (13 above), and Respondent's refusal to reemploy Cockrum thereafter, I conclude and find that such refusals violated Section 8(a)(3) of the Act in that such layoffs were for the purpose of discouraging the employees' union activities and in retaliation for their selection of the Union as their bargaining agent. The same questions regarding available work may be raised here as were raised in regard to the layoffs on April 18, which I have resolved against Respondent. Here Respondent again had the authority to assign the men to jobs and chose to retain nonunion men in preference to those it knew supported the Union. Respondent's reasons for so acting in the face of a *prima facie* case are not convincing.

In regard to the 8(a)(4) allegations of the complaint, I conclude and find that Respondent discriminatorialy laid off employees Donald Cockrum, Albert Wilson, George Smith, and Claude Sanders on April 18, 1968, in violation of Section 8(a)(4) and (1) of the Act, and that since April 18, 1968, Respondent has failed and refused to reemploy Claude Sanders in any manner in violation of Section 8(a)(4) and (1) of the Act, and I am not satisfied that it has fully and adequately reinstated Wilson or Smith. This latter is a question for the compliance stage of this case, but I make no finding that either of them has been adequately reinstated.

The findings of violations of Section 8(a)(1), (3), and (5) herein are made on the basis that having taken jurisdiction of this case because of the violations of Section 8(a)(4), the Board should exercise its jurisdiction in remedying any and all violations found.

C. *The Refusal to Bargain*

The events set forth above demonstrate amply that the Union made a demand for recognition backed up by a display of authorization cards on March 19 and requested Respondent to bargain. It is clear that Respondent refused to bargain with the Union, even after seeking and getting confirmation of the Union's majority in an unlawful manner from its employees. I find that the unit composition as of that date consisted of Smith, Wilson, Sanders, Perryman, and the two Cockrums. At the time of the demand Clyde Hunt had not been hired and from the threats made to the employees concerning discharge and the discharges that followed, it is natural to assume that Hunt was hired to replace one of the journeymen Scrivener was preparing to discharge. Clearly Statton had not yet been employed. Claybaugh could not come under any definition of a regular employee and neither could Albert Hunt who was probably not employed by Respondent until after the end of the school year and certainly after his father had begun work with Respondent.

Respondent also contends that Scrivener had a legitimate good-faith doubt concerning the validity of the authorization cards shown him by the Union in the morning of March 19. Scrivener testified that on looking at the cards he felt that the writing on several of them looked the same and he doubted their genuineness. Further he stated "I told Mr. Moore that I did not believe those were those boys' signatures. I did not think that they had signed those cards or I would have heard something about them signing them." Later in his testimony Scrivener denied that he had raised a question with Moore as to the genuineness of the signatures. When asked what he said to

Moore about the cards he answered "I did not say anything about the cards to the best of my knowledge." Scrivener testified once more that he did not say a word to Moore about the genuineness of the cards and said that he did not attempt to find out from the employees whether they signed the cards. He continued to maintain that his doubt that the Union had a majority, was based on his assessment that the signatures were not genuine.

Bill Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders identified the unambiguous authorization cards and testified they were told that the purpose in signing the cards was to authorize the Union to represent them, and that the cards would be shown to Scrivener as proof of the union's authority to bargain for the employees and that if he did not recognize the Union the cards could be used for filing a petition for an election. The fifth employee, "Don" Cockrum, testified somewhat differently but finally testified that he was told that the cards would be shown to Scrivener to show that the Union represented the employees. I credit the version of the four men and discredit "Don" Cockrum's contrary testimony.

I conclude and find that March 19 is the appropriate date for determining majority and on that date the Union represented the majority of Respondent's employees in an appropriate unit, made a demand on Respondent for recognition and requested that Respondent enter into collective bargaining with it.

Respondent refused to bargain then or thereafter with the Union and I conclude and find that such a refusal violated Section 8(a)(5) of the Act.[8] Respondent's claim of a good-faith doubt that the employees had signed the union authorization cards is

[8] See *Wilmington Heating Service, Inc.*, 173 NLRB No. 15.

shown false by the events and testimony including Scrivener's contradiction of himself as to whether or not he raised such a doubt to the union representatives at the time he was shown the cards (I have found that he did not). Moreover if there were ever any such doubt, the employees resolved it for him when he questioned them that morning about their joining the Union. If Scrivener had any doubts as to the validity of the signatures, he was not in good faith but was on the basis that he was surprised that his employees did not tell him about it before signing the authorization cards with the Union, since he thought he had them talked into joining the Union of his choice. Further Scrivener sought to undermine the Union by telling Sanders and others that the Union said they would replace the men as soon as a contract was signed, seeking to get them to disavow their union allegiance. Scrivener hired Hunt as a replacement for one of the journeymen that day in anticipation of discharging some of the union adherents. Again the fact that the Union represented a majority was clearly demonstrated to Scrivener by the men themselves both on the jobsite and that evening when in response to his urging they appeared at the shop and were lectured by Respondent's attorney and still maintained their allegiance to the Union demonstrating clearly that the Union represented them.

From the facts and from his testimony Scrivener evidently was disturbed by this turn of events to the point where he raised some question as to whether the men could have meant to do this to him, taking it as a personal affront that they joined the Union.

In these circumstances, I cannot find the Respondent had a good-faith doubt as to the Union's majority but must find that his doubt, if any, was in bad faith and that he acted in bad faith by thereafter attempt-

ing to undermine the Union and get the men to reverse their stand by embarking on a campaign of 8(a)(1) and (3) violations.

III. The Effects of the Unfair Labor Practices Upon Commerce

The activities of Respondent as set forth in Section II, above, and particularly those actions found violative of Section 8(a)(4) of the Act, together with the acts herein found in violation of Section 8(a)(1), (3), and (5) of the Act, occurring in connection with the Respondent's business operations as set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The Remedy

Having found that Respondent engaged in the unfair labor practices set forth above(it is recommended that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act as follows:

Since Respondent on and after March 19, 1968, and at all times since they has refused and still refuses to bargain with the Union as the representative of its employees in an appropriate unit, it is recommended that Respondent, upon request, bargain collectively with the Union and in the event that an understanding is reached, embody such understanding in a signed agreement.

Respondent having discharged Donald Cockrum, Albert Wilson, Wesley Smith, and Claude Sanders on or about April 18, 1968, in violation of Section 8(a)(4)

of the Act and Respondent having discharged William Cockrum, Wesley Smith, and Albert Wilson on March 19 and 20 and further having laid off employees William Cockrum and George Smith on March 27, 1968, and not having reinstated employees William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith all in violation of either Section 8(a)(3) or (4) of the Act, I recommend that Respondent offer them immediate and full reinstatement to their former positions or if those positions are unavailable due to a change in Respondent's operations then to a substantially equivalent position without prejudice to their seniority or other rights and privileges. Respondent shall make them whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them by payment to them of a sum equal to that which each would have received as wages from the dates of their discharge or layoffs until the date Respondent reinstates them less any net interim earnings. Backpay is to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent per annum to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. I further recommend that Respondent make available to the Board, upon request, payroll and other records in order to facilitate checking the amounts of backpay due and the rights of each of these employees.

Respondent has also interfered with its employees' rights by encouraging them to join another labor organization, interrogating them concerning their union activity and their meeting with an agent of the Board, and by threatening them with loss of employment because of their union activity and further threatening to blackball them from other jobs because of their union activity.

Having found that Respondent has broadly disregarded its employees' rights by its refusal to bargain, by its discharges and layoffs, by its violations of Section 8(a)(1), and by its violations of Section 8(a)(4) has violated the basic rights provided by the Act, I am of the opinion that Respondent probably might commit other unfair labor practices unless it is broadly enjoined from so doing. Since part of the purpose of the Act is to prevent the commission of further unfair labor practices, I recommend that Respendent be placed under a broad order to cease and desist from in any other manner infringing upon the rights guaranteed its employees by the Act.

On the basis of the foregoing findings and the entire record in this matter I make the following:

Conclusions of Law

1. Robert Scrivener, d/b/a A A Electric Co. is an employer affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Respondent excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since March 18, 1968, the Union has been and now is the exclusive representative of the employees in the said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent, by refusing to bargain with the Union on and after March 19, 1968, as the exclusive representative of its employees in the appropriate unit set forth above, has engaged in and is en-

gaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

6. Respondent, by discriminatorily laying off or discharging employees Albert Wilson, Donald Cockrum, Claude Sanders, and Wesley Smith on April 18, 1968, and thereafter refusing to reinstate Wilson, Sanders, and Smith because they were interviewed by, and gave testimony to, an agent of the Board conducting an investigation of the charges in this case, violated Section 8(a)(4) of the Act, and thereby engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(4) and (1) and 2(6) and (7) of the Act.

7. Respondent, by discriminatorily discharging William Cockrum, Wesley Smith, and Albert Wilson on March 19 and 20, 1968, and by discriminatorily laying off employees William Cockrum and Wesley Smith on March 27, 1968, and by refusing thereafter to reemploy William Cockrum all because of the union sentiments, membership, and activities of these employees, Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(3) and (1) and 2(6) and (7) of the Act.

8. Respondent has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act by: (a) encouraging employees to join a labor organization of Respondent's choice; (b) polling, or causing a poll to be taken of its employees in order to ascertain their union sympathy; (c) interrogating employees concerning their union activity; (d) interrogating employees concerning their meeting with and being interviewed by an agent of the Board; (e) threatening employees with loss of em-

ployment on account of their union activity; and (f) threatening employees with blackballing them from other employment because of their union activity.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this case considered as a whole, it is recommended that Robert Scrivener, d/b/a A A Electric Co. of Springfield, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging employees to join a labor organization of Respondent's choosing.

(b) Polling, or causing its employees to be polled, in order to ascertain their union activity.

(c) Interrogating its employees concerning their union activity.

(d) Interrogating employees concerning their meeting with, and being interviewed by, an agent of the Board.

(e) Threatening employees with loss of employment on account of their union activity.

(f) Threatening employees with blackballing them from other employment because of their union activity.

(g) Refusing to bargain collectively in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Local 453, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of the employees in the appropriate unit described in paragraph 3 of the section above entitled "Conclusions of Law."

(h) Discouraging membership in and activities on behalf of Local 453, International Brotherhood of Electrical Workers Union, AFL-CIO, by discriminatorily discharging or laying off and not reinstating its employees.

(i) Discouraging employees from being interviewed by an agent of the Board or cooperating with the Board in its investigation of charges against the employer, by discriminatorily discharging and not reemploying its employees.

(j) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization to form labor organizations, to join or assist Local 453, International Brotherhood of Electrical Workers, AFL-CIO, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all the employees in the appropriate unit and embody in a signed agreement any understanding reached.

(b) Offer to William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith reinstatement in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(c) Make Donald Cockrum, William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith whole for any loss of pay they may have suffered by reason of Respondent's discrimination against them in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, contracts and contract bids, and all other records necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(e) Notify Donald Cockrum, William Cockrum, Claude Sanders, Albert Wilson, and Wesley Smith if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(f) Post at its Springfield, Missouri, shop and office, copies of the attached notice marked "Appendix."* Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 17, in writing, within 20 days from the receipt of this

---

* In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

Decision, what steps have been taken to comply herewith.[10]

Dated at Washington, D.C.

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

Following a trial in which the Company, the Union, and the General Counsel of the National Labor Relations Board participated and offered their evidence, it has been found that we violated the National Labor Relations Act and we have been ordered to post this notice and to abide by what we say in this notice.

WE WILL NOT ask you what union you want to join nor try to get you to join a union we want.

WE WILL NOT ask you about your union activities.

WE WILL NOT ask you about any meeting you may have with an agent of the National Labor Relations Board.

WE WILL NOT threaten you with loss of your jobs because of your union activities.

---

[10] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

WE WILL NOT threaten to blackball you from other work because of your union activities.

WE WILL NOT interfere with your right to file charges against us or be interviewed by or give affidavits to agents of the National Labor Relations Board by laying off or discharging employees because they do so.

WE WILL NOT try to discourage you from becoming or being members of Local 453, International Brotherhood of Electrical Workers, AFL-CIO, by unlawfully firing or laying off any of our employees.

WE WILL bargain collectively, upon request, with Local 453, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, WE WILL sign a contract containing such understanding. The unit is:

> All employees, excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL offer Donald Cockrum, William Cockrum, Claude Sanders, Wesley Smith, and Albert Wilson their former jobs with all of their rights and any backpay due them.

WE WILL notify the above-named employees if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the

Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

All our employees are free to become or remain union members.

ROBERT SCRIVENER, d/b/a
A A ELECTRIC CO.
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, Telephone 816—FR4-5181.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 426461 682